Nordin Hamid & Co v Emco Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-12-144 OF 1994
ABDUL KADIR SULAIMAN J
26 SEPTEMBER 1998

Contract — *Breach — Action for damages — Appellant appointed solicitors for sale and purchase agreements for 489 housing units — Appellant conducted agreements for 270 units — 219 units given to other solicitors — Whether appellant only entitled to claim in quantum meruit — Whether contract was severable — Whether contract void from breach of s 84 of Legal Profession Act 1976*

Civil Procedure — *Costs — Costs following the event — Respondent made payment into court in settlement of suits — Payment not accepted — Respondent found liable in both suits — Whether costs should follow event — Whether trial judge was right in awarding costs only until date of payment into court*

The respondent had entered into a joint venture agreement with the Selangor State Development Corp to develop a housing development project which consisted of 489 housing units. The appellant, a firm of solicitors, was appointed by both parties to prepare the sale and purchase agreements and other related conveyancing matters with potential purchasers at certain agreed fees. The appellant conducted the sale and purchase agreement for 270 housing units only whereas the other remaining 219 housing units were given to other solicitors to perform. The appellant commenced an action in the lower court seeking RM27,400 as the balance of legal fees for services rendered in relation to the 270 housing units. The appellant subsequently sued the respondent for a sum of RM76,650 being payment accruing for the sale and purchase agreements of the remaining 219 housing units. The two actions were later consolidated and the respondent paid RM43,339.19 into court but this was not accepted. The respondent argued that: (i) the contract was severable and divisible and there was no package deal; (ii) the appellant was in breach of s 84 of the Legal Profession Act 1976 ('the 1976 Act') as the appellant was acting for both the respondent and potential purchasers and as such, the contract was void and unenforceable; and (iii) the appellant was only entitled to compensation for work actually done, pursuant to s 66 of the Contracts Act 1950. The trial judge held that the contract was divisible and that the appellant was only entitled to claim in quantum meruit. He allowed the claim for RM27,400 but ordered that the appellant be awarded costs only until the date of payment into court by the respondent. The claim in relation to the 219 housing units was dismissed. The appellant appealed against the decision on costs in the first claim and the dismissal of the second claim.

Held, allowing the appeal:

(1) It was clear that the employment of the appellant was for the work to be done for the entire 489 housing units and was a 'package deal'. Though the appellant called for payment of fees from time

A to time, this did not turn the contract into a severable one. The failure on the part of the respondent to allow the appellant to complete all the housing units would render the respondent in breach of the contract, the quantum of which was RM76,500. The question of quantum meruit would not arise (see p 128C–E).

B (2) There was no evidence to show that the appellant contravened s 84 of the 1976 Act. In any event, upon a reading of s 84 of the 1976 Act, it was clear that even if the appellant had contravened the section, it would not render the contract void and unenforceable. The consequence upon contravention would only be disciplinary in nature (see p 128F).

C (3) The payment into court was made by the respondent on the basis that it was a settlement in respect of both suits. Since that was not accepted and the respondent was found to be liable in respect of the first claim, the costs should follow the event. Since the result of this appeal was that the appellant also succeeded in its second D claim, the costs of the proceedings should also follow the event. The decision of the trial judge was reversed and substituted with a judgment in favour of the appellant in respect of both the suits with costs to the appellant (see p 128H–I).

E **[Bahasa Malaysia summary**

Penentang telah mengikat satu perjanjian usaha sama dengan Perbadanan Kemajuan Negeri Selangor untuk mengusahakan satu projek pembangunan perumahan yang melibatkan 489 unit rumah. Perayu, sebuah firma peguamcara, telah dilantik oleh kedua belah F pihak untuk menyediakan perjanjian-perjanjian jual beli dan lain-lain perkara berkenaan kaedah pemindahhakan yang berkaitan dengan bakal-bakal pembeli pada yuran yang telah dipersetujui. Perayu telah menyediakan perjanjian jual beli untuk 270 unit rumah sahaja manakala baki 219 unit rumah yang selebihnya telah diserahkan kepada peguamcara lain untuk dilaksanakan. Perayu telah G memulakan tindakan di mahkamah rendah meminta RM27,400 sebagai baki yuran guaman bagi khidmat-khidmat yang telah dilaksanakan terhadap 270 unit rumah tersebut. Perayu kemudiannya mendakwa penentang untuk jumlah sebanyak RM76,650 yang merupakan bayaran terakru bagi perjanjian-perjanjian jual beli 219 unit rumah yang selebihnya. Kedua-dua tindakan ini H kemudiannya telah disatukan dan penentang telah membayar RM43,339.19 ke dalam mahkamah tetapi ini tidak diterima. Penentang telah berhujah bahawa: (i) kontrak tersebut boleh diasingkan dan boleh dibahagi dan tidak terdapat 'pakej'; (ii) perayu telah melanggar s 84 Akta Profesyen Undang-Undang 1976 ('Akta 1976') kerana perayu telah mewakili kedua-dua penentang dan bakal- I bakal pembeli, dan oleh itu kontrak tersebut adalah tidak sah dan tidak boleh dikuatkuasakan; dan (iii) perayu hanya berhak kepada pampasan bagi kerja-kerja yang dilakukan, menurut s 66 Akta Kontrak 1950. Hakim perbicaraan telah memutuskan bahawa kontrak

tersebut adalah boleh bahagi dan perayu hanyalah berhak menuntut dalam quantum meruit. Beliau telah membenarkan tuntutan terhadap RM27,400 tetapi telah memerintahkan perayu diberikan kos hanya sehingga tarikh pembayaran ke dalam mahkamah oleh penentang. Tuntutan berkenaan 219 unit rumah tersebut telah ditolak. Perayu merayu terhadap keputusan atas kos di dalam tuntutan pertama dan penolakan tuntutan kedua.

Diputuskan, membenarkan rayuan:

(1) Adalah jelas bahawa perlantikan perayu adalah untuk melaksanakan kerja bagi keseluruhan 489 unit rumah dan adalah satu 'pakej'. Walaupun perayu menuntut pembayaran fee dari masa ke semasa, ini tidak mengubah kontrak tersebut kepada kontrak boleh asing. Kegagalan penentang membenarkan perayu melengkapkan kesemua unit perumahan tersebut akan membuatkan penentang melanggari kontrak tersebut, dimana jumlahnya adalah RM76,500. Persoalan tentang quantum meruit tidak akan timbul (lihat ms 128C–E).

(2) Tidak ada keterangan yang menunjukkan bahawa perayu telah menyalahi s 84 Akta 1976. Di dalam apa keadaan sekalipun, setelah membaca s 84 Akta 1976 tersebut, adalah jelas jika sekalipun perayu telah menyalahi seksyen tersebut, ianya tidak akan menjadikan kontrak tersebut tidak sah dan tidak boleh dikuatkuasakan. Kesan daripda penyalahan hanyalah berbentuk tatatertib sahaja (lihat ms 128F).

(3) Pembayaran ke dalam mahkamah telah dibuat oleh penentang atas dasar ianya adalah penyelesaian bagi kedua-dua guaman. Memandangkan keputusan rayuan ini adalah perayu juga berjaya di dalam tuntutan keduanya, kos hendaklah mengikut keadaan. Keputusan hakim perbicaraan adalah diakaskan dan diganti dengan penghakiman berpihak kepada perayu bagi kedua-dua guaman dengan kos kepada perayu (lihat ms 128H–I).]

Notes

For cases on action for damages, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1613–1614.

For cases on costs following the event, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1212–1213.

Legislation referred to

Contracts Act 1950 s 66
Legal Profession Act 1976 s 84

Ng Choong Meng (*Ng Choong & Co*) for the appellant.
Conrad Young (*Azman Davidson & Co*) for the respondent.

Abdul Kadir Sulaiman J: Under a privatization arrangement, the respondent, a housing developer, entered into a joint venture agreement

with the Selangor State Development Corp ('the corporation'), for the respondent to develop the corporation's land into a housing estate known as Wangsa Baiduri Town Houses. The appellant, a firm of solicitors, was appointed by the joint venture partners to act only for them in the preparation of hire purchase agreements with the potential purchasers of the houses to be built on the land and other related conveyancing matters. All fees for payment to the appellant in relation to the services rendered were to be paid by the respondent. The respondent agreed to pay the legal fees to the appellant at the rate based on the purchase price of each unit of the houses to be sold. The rate for the purchase price of RM145,000 and below was RM300, for those above RM145,000 to RM169,500 the rate was RM350, and for those above RM169,500 the fee was RM400. The total units of houses involved were 489 made up of 150 units of town houses 2½ storeys high and 339 units of town houses two storeys high. The appellant accepted the offer. The appellant conducted the sale and purchase agreements for 270 units only but the remaining 219 units were believed to have been given by the respondent to other solicitors for the service. By a letter dated 12 August 1988, the appellant demanded from the respondent a sum of RM76,650 at RM350 per unit being payment for the sale and purchase agreements of the said 219 units alleging that the respondent had breached the agreement between them by not getting the service of the appellant as agreed.

Meanwhile, by Summons No 62–1555–88 of 25 April 1988 and subsequently amended on 22 July 1991, the appellant sued the respondent in the sessions court for RM27,400 being the balance of professional legal fees for services rendered to the respondent at its request together with 8% interest pa on the sum of RM22,500 from 8 May 1987 until realization, on the sum of RM2,150 from 4 January 1988 until realization and on the sum of RM2,750 from 9 January 1988 until realization and costs in respect of the 270 units rendered. Then, on 12 September 1988, by Summons No 62–3284–88, the appellant sued the respondent in the sessions court for RM76,650 with 8% interest and costs being payment for the sale and purchase agreements for the outstanding 219 units alleged to have been given by the respondent to other solicitors for the service agreed to be performed by the appellant.

The amended defence of the respondent in respect of the claim in Summons No 62–1555–88 is a denial of the said claim and that in the alternative, the appellant, if so acting, was acting in breach of s 84 of the Legal Profession Act 1976 ('the 1976 Act'). Consequently, the agreement is void and unenforceable as the respondent acted for both the respondent as a housing developer and the purchasers. The defence of the respondent in Summons No 62–3284–88 was also a denial of the claim by the appellant averring that the appellant does not have monopoly of conducting the sale and purchase agreements for all the 489 units, thereby refuting the allegation of any breach on the part of the respondent. The respondent contends that the appellant has no right to claim for work which it did not perform. In the alternative, the respondent had also acted in breach of s 84 of the 1976 Act thereby rendering the agreement between them void and unenforceable. Subsequently, these two cases were consolidated and a hearing of the actions was held in the sessions court.

Agreed facts between the appellant and the respondent were tendered before the court in respect of the two actions consolidated. A copy is to be found at p 45 of the record of appeal (vol 1). Inter alia, it was agreed that the appellant had so far conducted the sale and purchase agreements and other conveyancing matters for 270 units out of the 489 units which had been allocated to the appellant. The professional fee to be paid by the respondent to the appellant in respect of the 270 units is RM27,400 after contra of accounts between them. The remaining 219 units were subsequently handled by another solicitor or other solicitors, the professional fees representing damages for alleged breach of contract by the respondent in respect of this remaining number of units is RM76,650 as claimed.

Facts of contention for the respondent

(1) The contract with the appellant is not entire but severable and divisible.

(2) The appellant acted in breach of s 84 of the 1976 Act and the contract is therefore void and unenforceable.

(3) The appellant is only entitled to be compensated for work actually done pursuant to s 66 of the Contracts Act 1950.

Facts of contention for the appellant

(1) The contract is entire for the whole project of 489 units.

(2) The appellant was not acting for purchasers but exclusively for the respondent.

(3) The appellant does not admit to be in breach of s 84 of the 1976 Act. Even so, the respondent is not entitled to treat the contract as void.

On 8 December 1992, the respondent paid into court a sum of RM43,339.19 in respect of both the actions of the appellant.

PW1 in his evidence before the learned judge in the court below testified that to his knowledge, the said 219 units had been sold by the respondent but the appellant was not asked to complete the process of sale and purchase. Hence, the claim for the breach. It was denied that the appellant acted for both the developer and the purchasers. PW2 was the ex-executive director of the respondent from March 1985 to February 1987. It is his evidence for the appellant that the appellant was appointed to service the entire units of houses in Wangsa Baiduri Phase 1 consisting of 487 units of town house. It was a package deal. The appellant performed the service for some of the units but later it was given to another firm of solicitors as to the balance. The respondent did not call any witness before the learned judge. At the end of it, on 25 April 1994, the learned judge held that the contract with the appellant is divisible and not entire and as such the appellant was entitled only to claim on quantum meruit. Consequently, she allowed the claim of the appellant to the extent of RM27,400 in respect of work done which means to say that she allowed the amount claimed in Summons No 62–1555–88 in respect of the 270 units. However, she dismissed the claim of the appellant in Summons No 62–3284–88. As the

A sum of RM43,339.19 was deposited by the respondent into court in respect of both the actions, the appellant was only awarded costs before the payment into court by the respondent but for costs after the payment into court was being awarded to the respondent. As for interest over the sum of RM27,400 in favour of the appellant, she awarded interest at 8% pa from the date of payment of the money into court until realization. In her grounds B of decision of 6 June 1994, the learned judge made no mention at all relating to the issue of s 84 of the 1976 Act which concerns the appellant as the advocate and solicitor acting for the respondent as a developer and the purchasers in the housing development.

The appellant was unhappy with the said decision of the learned judge C and filed this appeal against the award of costs in respect of Summons No 62–1555–88 and the dismissal with costs in respect of Summons No 62–3284–88. Before touching on the issue of costs, I will first deal with the issue of the nature of the contract for service existing between the appellant and the respondent, ie whether it was an entire contract or a non-entire contract. By a letter dated 19 April 1986, the corporation, the joint D venture partner of the respondent, wrote to the appellant as follows:

> Tuan,
>
> Perlantikan Peguam bagi Projek Penswastaan PKNS/EMCO Properties Sdn Bhd di Lot 3067, Mukim Damansara
>
> Jenis:150 Unit Rumah Bandar 2½ Tingkat
>
> E 339 Unit Rumah Bandar 2 Tingkat
>
> Harga:RM169,500 seunit (2½ Tingkat)
>
> RM145,000 seunit (2 Tingkat)
>
> Berhubung dengan perkara di atas, sukacita dimaklumkan bahawa F *Perbadanan telah bersetuju melantik firma tuan bagi menguruskan kerja-kerja guaman untuk projek-projek Perbadanan yang diswastakan.* Dalam perkara ini firma tuan adalah diarah bertindak bagi pihak Perbadanan dan syarikat di atas sahaja.
>
> Perlu diingat, pihak tuan hendaklah memerhatikan kepentingan Perbadanan dan syarikat sentiasa diutamakan dan terpelihara. Segala bentuk G bayaran yang akan terlibat sewaktu menguruskan kerja-kerja tersebut hendaklah dituntut terus dari syarikat berkenaan.
>
> Pihak tuan akan dijemput menghadiri perbincangan berhubung dengan tugas ini bersama pihak syarikat dan Perbadanan dalam sedikit masa lagi.
>
> Sekian, terima kasih. (Emphasis added.)

H By a letter dated 15 April 1986, the respondent wrote to the appellant as follows:

> Dear Sirs,
>
> Re: Panel of Solicitors
>
> I We are pleased to inform you that Perbadanan Kemajuan Negeri Selangor has agreed to our nomination for your legal firm to act on their and our behalf in handling the sale and purchase agreement and other related conveyancing matters *in respect of our Wangsa Baiduri Townhouses in Petaling Jaya.* Perbadanan will be writing to you too in due course.

Meanwhile, we look forward to your continued support and prompt service at all times from you. (Emphasis added.)

By letters dated 5 May 1986 and 7 May 1986, the respondent agreed to pay the appellant the following as solicitor's fees for the purpose:

(1)	purchase price RM145,000 and below	RM300
(2)	purchase price above RM145,000 to RM169,500	RM350
(3)	purchase price above RM169,500	RM400

From the correspondence mentioned, it is clear that the employment of the appellant was for the work to be done on the 489 units comprised in the Wangsa Baiduri Town Houses project on the scale of fees as specified. Though the appellant called for payment of his fees from time to time as the work in respect of the respective sale and purchase agreements completed, it does not turn the contract into a severable one. The contract agreed upon was on a package deal in respect of the units in the housing project. However, instead of allowing the appellant to carry on with its part of the bargain, the appellant was allowed only in respect of 270 units out of the 489 units which had been allocated to it by the agreement. It is my view, therefore, that the contract was one which is entire and not severable as so found by the learned judge and for the failure on the part of the respondent to allow the appellant to complete would render the respondent to be in breach of the contract, the quantum of which is RM76,650 as agreed by the parties in the statement of agreed facts. In the circumstances, the question of payment on quantum meruit would not at all arise. As to the issue of s 84 of the 1976 Act, my view upon a reading of the section is that even if the appellant had contravened the said section, it would not render the contract void or unenforceable as according to sub-s (6) thereof the consequence upon the contravention is merely one of a disciplinary nature. In any event, there is no evidence in the present case of the contravention by the appellant of the said provisions of the said section. Under the circumstances, the learned judge was wrong in dismissing the claim of the appellant in Summons No 62–3284–88.

On the issue of costs, it was submitted before me that the payment into court was made by the respondent on the basis that it was a settlement in respect of both suits. Since that was not accepted and the respondent was found to be liable in respect of Summons No 62–1555–88, the costs should follow the event. Whatever is the argument in the light that the result of this appeal is that the appellant also succeeds in its claim in Summons No 62–3284–88, the costs of the proceedings should follow the event. In the circumstances, I would allow the appeal of the appellant and reverse the decision of the learned judge and substitute therewith a judgment in favour of the appellant in respect of both the suits as per its claim with costs to the appellant.

Appeal allowed.

Reported by Lew Chee Seong